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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 295

ASSOCIATION OF LITHUANIAN WORKERS

and

AMERICAN LITHUANIAN WORKERS LITERARY ASSOCIATION, INC., *Petitioners*,

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Association of Lithuanian Workers and American Lithuanian Workers Literary Association, Inc.[1] petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of

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[1] The petitioners are hereafter referred to as the Workers Association and the Literary Association respectively. The record in the Workers Association case is referred to as W. R., and that in the Literary Association case as L. R.

Columbia Circuit which affirmed judgments entered against petitioners by the United States District Court for the District of Columbia in suits brought by petitioners to enjoin the Attorney General from continuing to designate them as organizations within the purview of Executive Orders 10450 and 9835.

The court below consolidated the two cases for purposes of argument and opinion. Since the cases involve identical or closely related questions, a single petition is filed under this Court's Rule 23(5).

OPINION BELOW

The opinion of the court below has not yet been reported. It and the opinion of Judge Prettyman, dissenting as to the Association of Lithuanian Workers, appear in Appendix B, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1957 (W. R. 57; L. R. 45; Appendix B, *infra*). Jurisdiction of this Court exists under 28 U. S. Code 1254.

QUESTIONS PRESENTED

1. Whether the provisions of Executive Orders 9835 and 10450 authorizing the Attorney General to designate, for the purposes of the government employees security program, organizations as totalitarian, fascist, communist, subversive, etc., are constitutional on their face or as applied to petitioners, who have been designated under the Executive Orders.

2. Whether the Attorney General could, consistently with the Constitution, the Administrative Procedure

Act, and the Executive Orders, deny petitioners a hearing before designating them unless they replied "completely and with particularity" to interrogatories which were impossible so to answer, and which were irrelevant, burdensome, and invasive of privacy.

3. Whether petitioners, having been designated without a hearing, were precluded from obtaining judicial review of the propriety of the designation, because they did not exhaust "administrative remedies" in that they failed to reply to interrogatories which they protested and which were irrelevant, burdensome, invasive of privacy, and impossible to answer.

4. Whether the regulations of the Attorney General prescribing procedures for designating organizations violate, on their face or as applied to petitioners, the Constitution, the Administrative Procedure Act, or the Executive Orders.

EXECUTIVE ORDERS AND REGULATIONS INVOLVED

The pertinent provisions of Executive Orders 9835 and 10450 and of the Attorney General's Rules of Procedure are set forth in Appendix A, *infra*.

STATEMENT OF THE CASE

On January 22, 1954, the Attorney General designated each petitioner without hearing as an organization "within the purview of" Executive Orders 10450 and 9835 (W. R. 9, 19; L. R. 5, 13). These Orders require the Attorney General to furnish to the various federal agencies, for use in the administration of the government employees' security program, the names of organizations designated by him, "after appropriate investigation and determination," "as totalitarian,

fascist, communist or subversive or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means." Under the Executive Orders, membership in, or affiliation or sympathetic association with, an organization so designated by the Attorney General, adversely affects a person's eligibility for federal employment. (See Appendix A, *infra.*)

Each petitioner sued in the District Court to enjoin the Attorney General from continuing the designation. Each complaint alleged that the designation was unfounded in fact and arbitrary; that the designation provisions of the Executive Orders are unconstitutional; and that the designation was made in a manner which offended due process and the Administrative Procedure Act. Each complaint also alleged that the designation was injuring the organization's reputation, revenue and functions, and thereby threatening to destroy it. (W. R. 2-12; L. R. 2-7.)

The Attorney General filed answers in which "upon information and belief" he made allegations to the effect that each petitioner was a front for the Communist Party. (W. R. 13-14; L. R. 8-10). The answers also asserted that judicial relief was precluded by failure of each organization to "avail itself of the opportunity to obtain a full administrative hearing" (W. R. 19; L. R. 13). Attached to each answer as exhibits were copies of correspondence which had passed between the petitioner involved and the Department of Justice (W. R. 21-44; L. R. 14-32).

In each case the Attorney General moved for judgment on the pleadings (W. R. 44-45; L. R. 32), which consisted solely of the complaint and the answer, including the exhibits to the answer. The District Court granted the motions without stating grounds (W. R. 45; L. R. 33). The Court of Appeals affirmed, with Judge Prettyman dissenting in the Workers Association case.

The facts which appear from the pleadings are as follows.

The Workers Association Case

The Workers Association is a fraternal benefit society, incorporated under the laws of the State of New York. It has the corporate purposes of benefiting culturally, educationally and economically persons of Lithuanian descent. It conducts a non-profit insurance program for its members, operating under certificates of authority first received in 1930 under the New York Insurance Law. It functions under the lodge system, as defined in section 451 of the New York Insurance Law, and has 167 lodges in 18 states, in nine of which it is duly licensed and in nine of which it is permitted to maintain lodges without license. It has about 7,000 members. The face value of the life insurance alone presently carried with it by its membership amounts to more than $3,000,000. It also provides other types of insurance for its members. It arranges for lectures to its members, distributes pamphlets and articles on health subjects, and conducts occasional recreational and sporting events for its members. (W. R. 2-5.)

On April 29, 1953, the Assistant Attorney General wrote the Workers Association that the Attorney Gen-

eral proposed to designate it under the Executive Orders (W. R. 21). The Workers Association replied that it desired to contest the designation (W. R. 22). Under section 41.1(b) of the Attorney General's regulations (quoted in Appendix A, *infra*), this was the first step necessary to avoid a designation without further proceedings.

In accordance with section 41.2 of the Attorney General's regulations, an Assistant Attorney General thereupon sent to the Workers Association, under date of July 8, 1953, a statement of the grounds upon which the designation was proposed to be made and a set of interrogatories (W. R. 23-38). Section 41.3 of the regulations gives an accused organization sixty days within which to file a verified reply, signed by its executive officers. This section of the regulations also provides:

> "The reply shall answer each interrogatory completely and with particularity and shall be limited to statements of fact.[2] The organization may also submit supporting affidavits with its reply. Failure to answer any interrogatory or any part thereof shall be deemed an admission of the truth of the facts to which such interrogatory or part thereof refers. The submission of an evasive reply to any interrogatory or any part thereof shall likewise be deemed an admission of the facts to which such interrogatory or part thereof refers. Failure of the organization to file a reply within the sixty days provided therefor shall constitute an acquiescence in the designation."

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[2] It does not appear from the regulations that the organization is also required to reply "completely and with particularity" to the statement of the grounds for the proposed designation.

The regulations contain no provision authorizing the accused organization to serve interrogatories upon the Attorney General.

Section 41.4 of the Attorney General's regulations provides that an organization "filing a reply as provided in this Part may accompany its reply with a written request for a hearing." If this is done, the Attorney General may assign to conduct the hearing "such officer or board as he shall deem necessary" (sec. 41.7). Under section 41.8, however, the hearing officer may conduct the proceeding without the taking of evidence, if such a course appears appropriate to him "upon the basis of the statement, interrogatories, reply and affidavits (if any) submitted as provided in this Part." At this hearing, the statement of grounds constitutes evidence against the organization, section 41.8(b) authorizing the Attorney General to rely upon the statement. There is no provision making the organization's reply evidence for the organization. The Attorney General may also use as evidence against the organization information from undisclosed persons not subject to cross examination, section 41.8(i) authorizing the hearing officer "to receive as evidence on behalf of the Attorney General information or documentary material, in summary form or otherwise, without requiring disclosure of classified security information or the identity of confidential informants." Section 41.8(j) provides that witnesses shall be subject to cross-examination, "provided that no witness on behalf of the Government shall be required to disclose classified security information or the identity of confidential informants."

The statement of grounds served upon the Workers Association consisted of vague, conclusory and un-

particularized charges to the effect that the Workers Association promotes unstated Communist Party policies (W. R. 23-26). For example, the statement included allegations that the Workers Association:

> "has constituted a vehicle to further the aims, policies and objectives of the Communist Party—U. S. A., operating at all times as an instrument to promote affairs and functions designed to publicize and implement policies of the Communist Party—U. S. A." (W. R. 24);
>
> "has conducted, sponsored and co-sponsored and caused to be conducted, sponsored and co-sponsored receptions, parties, meetings and similar events for the purpose of carrying out the policies of the Communist Party—U. S. A." (W. R. 25);
>
> "has published and circulated and caused to be published and circulated, three newspapers, namely TIESA, VILNIS, and LAISVE which have consistently supported and implemented policies, aims and objectives of the Communist Party—U. S. A." (W. R. 25);
>
> "has never knowingly deviated in its program and objectives from the program and objectives of the Communist Party—U. S. A." (W. R. 25-26).

The interrogatories served upon the Workers Association were twenty-three in number, each containing several inquiries demanding numerous items of information (W. R. 26-38).

The complaint alleged (W. R. 7-8) that the "interrogatories would require the plaintiff to furnish an immense mass of detailed information and data, much of it obscurely defined, much of it patently unavailable to plaintiff and unobtainable, and virtually all of it of no possible relevance. It would entail a huge and

expensive burden for plaintiff to obtain and compile so much of the information requested as is possible to obtain. The thrust and effect of the statement of grounds and interrogatories are to make it impossible for plaintiff to answer the statement and interrogatories, and to lay an artificial foundation for the defendant to hold plaintiff in default and deny it the hearing which the defendant's regulations purport to make available." Since judgment was granted on the pleadings, the Workers Association was, of course, precluded from introducing evidence to support these allegations. However, a mere inspection of the interrogtories will show that they are of a sort which would have been produced by a draughtsman deliberately seeking to ask questions which could not possibly be answered because they sought information which the organization could not have or get and because they were vague to the point of unintelligibility. Inspection will also show that the interrogatories grossly invade privacy, search into opinions and publications, and assume the organization's guilt. We quote a few of the interrogatories as illustrations, noting that "L. D. S." refers to the Workers Association:

"INTERROGATORY (6)

(a) List the names and addresses of all those persons who are presently members of the L. D. S.

(b) Have any of those persons listed in answer to Interrogatory 6(a) at any time been

i. members of
ii. affiliated with
iii. sympathetically associated with

the Communist Party—U. S. A. or any other group officially designated by the Attorney General pursuant to Executive Orders 1040 and 9835?

(c) If the answer to Interrogatory 6(b) or any part thereof is in the affirmative, list the names and addresses of all such persons and indicate the periods during which they were

i. members of
ii. affiliated with
iii. sympathetically associated with

the Communist Party—U. S. A. or any other group officially designated by the Attorney General pursuant to Executive Orders 10450 and 9835 (W. R. 28-29.)[3]

"INTERROGATORY (7)

(a) List the names and addresses of persons who have, at any time, been engaged or invited to speak or to appear as guests by the L. D. S. and its various lodges and branches or by officials or members of the L. D. S. and its various lodges and branches at any meetings, conventions or other functions that were conducted, sponsored or co-sponsored by the L. D. S. or any of its various lodges or branches.

(b) State as to each such person listed, the date and location of the affair to which invited or engaged to speak or appear as a guest.

(c) Have any of those persons listed in answer to Interrogatory 7(a) at any time been

i. members of
ii. affiliated with
iii. sympathetically associated with

the Communist Party—U. S. A. or any other group

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[3] As to this interrogatory, Judge Prettyman commented in his dissenting opinion (W. R. 53): "There are some 7,000 members of the Workers, and there are some 250 organizations on the Attorney General's list. It was impossible for anyone to say under oath whether any of 7,000 members had ever at any time been sympathetically associated with any one of 250 organizations."

officially designated by the Attorney General pursuant to Executive Orders 10450 and 9835?

(d) If the answer to Interrogatory 7(c) or any part thereof is in the affirmative, list the names and addresses of all such persons and indicate the periods of time during which they were

i. members of
ii. affiliated with
iii. sympathetically associated with

the Communist Party—U. S. A. or any other group officially designated by the Attorney General pursuant to Executive Orders 10450 and 9835. (W. R. 29-30.)[4]

"INTERROGATORY (8)

(a) Has the L. D. S. or any of its various lodges or branches or its officials or members at any time published or circulated or caused to be published or circulated articles, pamphlets, leaflets, newsletters or other printed material?

(b) If the answer to Interrogatory 8(a) is in the affirmative, list the title of each particular item, the date of publication (day, month and year) and enclose copies of each such item listed with the verified reply (W. R. 30.)

"INTERROGATORY (9)

(a) Has the L. D. S. or any of its various lodges and branches, at any time, knowingly deviated in any manner whatsoever from the policies and program of the Communist Party—U. S. A., its leaders and members?

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[4] As to this interrogatory Judge Prettyman commented in his dissent (W.R. 54): "There are 167 lodges in the Association. Nobody, I venture to assert, could list all the persons invited to speak or to appear as guests at every meeting for twenty-three years of all of 167 lodges by any and all of 7,000 members."

(b) If the answer to Interrogatory 9(a) is in the affirmative, state the particular points and time of any such deviations. (W. R. 30-31.)

"INTERROGATORY (13)

(a) Have the newspapers *The Worker* and the *Daily Worker* at any time given publicity coverage to the L. D. S. or any of its various lodges and branches?

(b) If the answer to Interrogatory 13(a) is in the affirmative, specify the newspaper and edition, date and page number where the L. D. S. or any of its various lodges and branches are mentioned. (W. R. 32.)

"INTERROGATORY (20)

(a) State any contact, dealing, communication or other connection, directly or indirectly, between the L. D. S. or its various lodges and branches or its officials or members and the American Lithuanian Workers Literary Association. (W. R. 36.)

"INTERROGATORY (23)

(a) Did the Communist Party—U. S. A. or any of its officers or members at any time order, instruct or recommend that any person or group of persons join the L. D. S. or any of its various lodges or branches?

* * * * *

(c) If the answer to Interrogatory 23(a) or 23(b) is in the affirmative, indicate the time and place that such orders, instructions or recommendations were made, by whom and to whom made, the content of such orders, instructions or recommendations and the manner in which such orders, instructions or recommendations were acted upon." (W. R. 37-38.)

The Interrogatories concluded by directing attention to the criminal penalties for the making of false statements to a government agency (W. R. 38).

On September 8, 1953, within the sixty-day period for reply, the Workers Association wrote the Attorney General over the signatures of its president and secretary (W. R. 39-41). This letter denied the charges made in the statement of grounds, protested that the interrogatories were impossible to answer and thus deprived the Association of a hearing, and objected to the Attorney General's hearing rules because they allowed him to make his determination "on the basis of secret and confidential information which will not be disclosed to us." The letter stated (*ibid.*):

> "This Association is a fraternal benefit society chartered under Article 7 of the Insurance Law of the State of New York on November 5, 1930. It received its Certificate of Authority to do business from the Superintendent of Insurance of the State of New York on July 7, 1931, and since that time has carried on its business and affairs under the direct supervision of the Superintendent. It is licensed also to do business in several other states throughout the country.
>
> "Your basic charge, although expressed in the most general terms, is that the Association is carrying out the policies of the Communist Party.
>
> "The Association is not a political organization; it is not carrying out the policies of the Communist Party or of any other party.
>
> "The activities of the Association are confined strictly to those of a fraternal insurance beneficial society, as provided by its Charter and its Constitution and By-laws promulgated thereunder.
>
> * * * * *

"During all of the years of the Association's existence, neither the Insurance Department of the State of New York or of any other state where the Association is licensed to do business has had occasion to indicate that any of its activities is or was in violation of its Charter. The Association's activities have contributed measurably to the welfare and security of its thousands of members and their families.

"Your rules and requirements make it impossible for the Association to have a hearing in regards to your proposed listing. For example, you would require the officers, under penalty of perjury, to furnish you with names and addresses of all of its members and to indicate with respect to each and every one, what his political beliefs, affiliations and 'sympathetic associations' are or ever were. This requirement is, as you must know, impossible to meet. Yet your rules provide that we are not entitled to a hearing unless we first comply with this and other unconstitutional and impossible requirements. As the Association accepts as members persons without regard to their political, religious or social beliefs, we do not have any records of any political affiliations of our members. Therefore, it would be impossible for us to supply you with this information, even if the officers of the Association were prepared to violate its Constitution and By-laws and the non-political principles upon which it is founded.

"In addition, your rules for the hearing allow you to make your determination solely on the basis of secret and confidential information which will not be disclosed to us. A proceeding based on such practice is not a hearing in any real or legal sense of the word.

"The procedures you have adopted in this matter are unfair and undemocratic and contrary to the laws and traditions of this Nation.

"In view of the foregoing, we respectfully request that you discontinue this proceeding against the Association. Should you persist in your avowed purpose to list it, the Association will have no alternative except to seek justice in the courts."

The Attorney General did not reply to this letter (W. R. 8).

Thereafter, the Workers Association retained counsel (W. R. 8, 42). On October 4, 1953 counsel wrote the Attorney General notifying him that he had been retained (W. R. 42). He also stated in his letter (W. R. 42-43):

"An examination of the Interrogatories attached to your notice of July 8 discloses that aside from those numbered (1), (2) and (3), the Interrogatories are improper in that they are impossible to answer or in that they call for information which it is improper for you to attempt to elicit. For example, the Association does not have the information relating to political beliefs or affiliations called for by Interrogatory (5), (b) and (c), Interrogatory (6), (b) and (c), Interrogatory (7), (c) and (d), and other of the Interrogatories. Aside from this, the Interrogatories violate the First and Fifth Amendments to the Constitution.

"So that there may be no misunderstanding, I am writing to advise that the Association desires a hearing pursuant to Title 28, Chapter I, Part 41, Section 41.1 et seq. of the Code of Federal Regulations but does not believe that such a hearing should be conditioned upon responses to Interrogatories (4) to (23), inclusive, and further believes that such a hearing should conform to the requirements of due process, including the right to examine and cross-examine all witnesses.

"I would appreciate it if you would consider this as a motion for the withdrawal of the Interrogatories, except Interrogatories (1), (2) and (3) and as a request for a hearing on the Statement of Grounds at which the Association may be advised of the witnesses and testimony against it, have the opportunity to cross-examine such witnesses and to produce evidence in its own behalf. I do not believe that a proceeding at which there is received ex parte evidence, not disclosed to the Association nor subject to cross examination, would constitute a hearing."

To this letter the Assistant Attorney General replied on November 25, 1953 (W. R. 43-44):

"The statement of grounds and interrogatories with respect thereto were forwarded to the Association of Lithuanian Workers and received by it on July 13, 1953. On September 8, 1953, the Association advised the Department that it rejected the hearing provided for under the rules promulgated by the Attorney General in connection with the designation of organizations under Executive Order No. 10450. Your letter of October 4, 1953, was not filed within the sixty day period provided for in the rules. In addition, the request for a hearing contained in your letter was not signed by the executive officers of the Association. Therefore your request for hearing is both not in time and not in proper form.

"For your information I am enclosing herewith a copy of the rules promulgated by the Attorney General. You will note that Section 41.3 provides that failure of the organization to file a reply within the sixty days provided therefor shall constitute an acquiescence in designation."

As the complaint alleges (W. R. 9) and the answer admits (W. R. 19), on December 4, 1953, counsel for

the Workers Association replied to the Assistant Attorney General, pointing out that (contrary to the Assistant Attorney General's assertion) the organization's letter of September 8, 1953, did not reject a hearing, and renewing his request for the withdrawal of the interrogatories (other than the first three) and for a hearing. The Department of Justice never answered this letter (W. R. 9, 19). Instead, on January 22, 1954, the Attorney General, without any further communication with the Workers Association or its counsel and without hearing, summarily designated the Workers Association as an organization within the purview of the Executive Orders, on the grounds that it had failed to answer "each interrogatory completely and with particularity" (19 Fed. Reg. 655; W. R. 9).

In affirming the judgment entered on the pleadings in favor of the Attorney General, the majority below (Judges Wilbur K. Miller and Danaher) held (W. R. 50) that judicial review of the propriety of the designation was precluded because the Workers Association "did not reply to or challenge the interrogatories before the administrative body which would have entitled it to a hearing," and, "This was clearly a refusal to utilize the administrative process."

The fact is, of course, that, contrary to this holding, the Workers Association had, within the time allowed to answer, challenged the interrogatories by its letter of September 8, 1953, quoted *supra*, pp. 13-15. The interrogatories were also challenged by the later communications of its counsel, sent before the designation was made. The majority opinion itself noticed the fact that in the September 8, 1953 letter the Workers Association "wrote to the Attorney General asserting its

innocence, *complaining that the interrogatories were impossible to answer, and attacking the hearing procedure as 'unfair and democratic and contrary to the laws and traditions of this Nation.'*" (W. R. 48, emphasis supplied).

In the court below, the Workers Association had argued that so far from refusing an administrative hearing, it had been denied one by being required, as a condition to obtaining a hearing, to answer "completely and with particularity" interrogatories which were illegal and impossible so to answer, and which it had protested. The majority below rejected this contention without, however, examining the interrogatories. Its thesis seems to have been that the organizatjon's protest (which the Attorney General never answered) that the interrogatories were impossible to answer and that the Attorney General's procedures were unfair and illegal, did not "challenge the interrogatories" because the Workers Association did not also ask that the impossible and illegal interrogatories be withdrawn or changed. The majority below viewed the organization's protests as acts of recalcitrance, particularly because the organization had said that if it were listed it would "seek justice in the courts."

That such was the reasoning of the majority below appears from the following passages from its opinion (W. R. 48, 50):

> " . . . under date of September 8, 1953, [the Workers Association] wrote to the Attorney General asserting its innocence, complaining that the interrogatories were impossible to answer, and attacking the hearing procedure as 'unfair and undemocratic and contrary to the laws and traditions of this Nation.' The Association did not

ask that the interrogatories be modified or withdrawn, nor did it seek a conference or hearing concerning them. Having decided for itself that both the interrogatories and the prescribed hearing procedure were improper and unacceptable, the Association washed its hands of the whole matter and issued an ultimatum to the Attorney General in the closing paragraph of its letter, which we quote: 'In view of the foregoing, we respectfully request that you discontinue this proceeding against the Association. Should you persist in your avowed purpose to list it, the Association will have no alternative except to seek justice in the courts.'

* * * *

"As we have seen, the [Workers Association] did not reply to or challenge the interrogatories before the administrative body, which would have entitled it to a hearing. Instead, it notified the Attorney General that he must withdraw the designation proceeding or be faced with litigation. This was clearly a refusal to utilize the administrative process, and precludes judicial review of the grounds for and the propriety of designation."

The Workers Association had also argued that "even a rejection of the administrative remedy would not bar judicial determination *after designation* of whether the designation was made by an invalid procedure and whether the designation power is unconstitutional." The majority ruled as to these points that the designation provisions of the Executive Orders and the Attorney General's procedures thereunder were valid. (W. R. 51)

Judge Prettyman dissented on the grounds that, "The Workers were not proffered due process and they adequately tried to obtain valid consideration

from the administrative agency" (W. R. 52). He pointed out that the regulations required that each interrogatory be answered "completely and with particularity" as a condition to obtaining, or even requesting, a hearing (W. R. 52). He analyzed the interrogatories and concluded that this condition could not be met because, "Many of the interrogatories were impossible—not merely difficult but impossible—to answer completely and with particularity" (W. R. 53). He stated further (W. R. 54): "A reading of all of the interrogatories as they appear in the record will demonstrate my point beyond peradventure of doubt. They were impossible to answer." Judge Prettyman also held that the Workers Association's letter of September 8, 1953 had been a timely statement of objections to the interrogatories (W. R. 54-55). He stated also (W. R. 55): "In response to the charges forwarded to them, as distinguished from the interrogatories, the Workers' letter of September 8th made clear and careful response, categorically denying the purport of the involved charges and affirmatively asserting the activities to which the Association is 'confined strictly.'" Judge Prettyman also stated (W. R. 56) that he had "considerable doubt as to the validity of parts" of the Attorney General's regulations, particularly the provision that failure to answer an interrogatory or an evasive reply would "be deemed an admission of the facts to which such interrogatory or part thereof refers."

The Literary Association Case

The Literary Association is a non-profit organization incorporated under the laws of New Jersey, Pennsylvania, Illinois, Connecticut, Michigan and New York.

It has 97 branches in 18 states, and its activities are largely carried on by and through these branches (L. R. 2-3). Its purposes and activities, as described in the complaint, are as follows (L. R. 2-3):

> "To publish writings, papers, books, pamphlets, newspapers, periodicals and other publications in various branches of learning; to establish libraries; arrange literary programs, and theatrical entertainments; to work for the intellectual, moral and social advancement of the members; all without pecuniary profit. All of these purposes are carried out by [it], with particular application to promoting the cultural and social advancement of persons in the United States of Lithuanian origin or descent. [It] publishes books and a literary quarterly, sponsors meetings and lectures on topics of art, literature, current events, etc., and sponsors handicraft exhibits, plays, and various other cultural and social affairs."

On April 29, 1953, the Assistant Attorney General wrote the Literary Association that the Attorney General proposed to designate it under the Executive Orders (L. R. 14). On May 21, 1953, the Literary Association replied that it desired to contest the designation (L. R. 15).

On July 23, 1953, the Assistant Attorney General sent the Literary Association a statement of the grounds upon which the designation was proposed and a set of interrogatories (L. R. 16-29). The statement of grounds, like that described in the Workers Association case, consisted of generalized and vague charges to the effect that the Literary Association is under Communist influences and advances Communist Party policies. Like the Workers Association, the Literary Association was charged with being a Communist Party

"vehicle" (L. R. 16) and with having "never knowingly deviated" from the policies of the Communist Party (L. R. 18).

The interrogatories served on the Lithuanian Association (L. R. 18-19), though somewhat more restrained than those served on the Workers Association, demanded great masses of information, much of which the organization could not be expected to have or be able to obtain, and invaded organizational privacy, showed a desire to examine the organization's publications, and were in many instances vague. They demanded the names and addresses of all past and present members of the Literary Association (Interrogatory 33, L. R. 28) and of all persons who had ever been asked to speak at any meetings or functions of the organization and its branches (Interrogatory 27, L. R. 26). Although the Literary Association has never inquired into the politics of its members (L. R. 30), no less that fourteen of the interrogatories inquired whether persons were ever members of the Communist Party (Interrogatories 2, 6, 8, 10, 12, 13, 14, 15, 16, 17, 18, 19, 27, 38).

On September 23, 1953, the Literary Association sent the Attorney General its reply to the charges and interrogatories, signed and verified by its president and secretary (L. R. 11, 30-32). The reply read as follows (L. R. 30-31):

> "American Lithuanian Workers' Literary Association, Inc., hereinafter referred to as ALWLA, replying to the Statement of Grounds and Interrogatories propounded to it respectfully alleges:
>
> "1. Admits that the ALWLA was incorporated on June 8, 1932, under the laws of the State of New York.

"2. As to the other Statement of Grounds and Interrogatories the ALWLA states that it has always abided by the terms of its Certificate of Incorporation and has consistently adhered to its purpose of publishing writings, papers, books, pamphlets and periodicals and has carried on associated literary activity such as establishing libraries, arranging theatrical and literary programs and in general, working for intellectual, social and moral advancement of its members. In all this work the association at no time ever inquired into the politics or religion of its members. In all of its long and glorious existence, the ALWLA never had any trouble or misunderstanding with the Government of the United States or with any of its institutions. We wish to state that ALWLA was the first and only organization in the United States to translate fully, publish widely and distribute among the Lithuanians in this country the U. S. Constitution and Declaration of Independence, as well as short biographies of Washington, Jefferson, Franklin, Andrew Jackson, Abraham Lincoln and other great Americans.

"3. In view of the nature of its activity as set forth in its Certificate of Incorporation and as consistently carried out by the organization, the ALWLA asserts that its activities do not come within the provisions of Executive Order 10450. It further specifically asserts that under the Constitution of the United States and particularly under the First Amendment thereto, the Attorney General is without power to inquire into the writings and publishings of the ALWLA and has no authority therefore to make the proposed listing.

"4. The alleged authority given to the Attorney General under Executive Order 10450 and the Regulations of the Attorney General as attempted to be applied to this organization is neither expressly nor impliedly authorized by the United States Constitution and is violative of the pro-

visions not only of the First Amendment, but also of the Fifth, Ninth and Tenth Amendments to the U. S. Constitution:

"Specifically, proper standards are not set forth in the Executive Order and in the regulations promulgated by the Attorney General; the so-called standards are vague, indefinite and without clear meaning, and the Regulations perpetuate the uncertainty.

"The proceedings should be dismissed."

On January 22, 1954, the Attorney General, without further communication with the Literary Association and without hearing, summarily designated it as an organization within the purview of the Executive Orders on the grounds that it had failed to answer "each interrogatory completely and with particularity" (19 Fed. Reg. 655; L. R. 12, 3).

The court below affirmed the judgment in favor of the Attorney General on the ground that the Literary Association's reply "was not a response to the Attorney General's statement of grounds and interrogatories, but a demand for dismissal on pleas of innocence and unconstitutionality. Having failed to reply, the Association cannot obtain judicial relief from designation." (L. R. 39-40).

Judge Prettyman concurred in the result as to the Literary Association on the ground that the organization "failed to make to the Attorney General an objection to the proffered procedure with sufficient specificity to enable him to pass upon the challenge. It merely asserted that the whole proceeding was unconstitutional." (L. R. 40.) Judge Prettyman thereby appears to have overlooked or to have regarded as in-

sufficient the facts that the Literary Association's reply (1) stated that it had never inquired into the politics of its members, thereby showing that it could not answer the numerous interrogatories on that subject, and (2) asserted that under the Constitution the Attorney General "is without power to inquire into the writings and publishings" of the organization, thereby indicating a protest against at least six of the interrogatories (numbers 20, 21, 22, 31, 36, 38, L. R. 24-29).

REASONS FOR GRANTING THE WRIT

This case presents substantial and important questions concerning the constitutionality of the Attorney General's claimed power to list organizations as "subversive," the validity of his listing procedures, and the responsibility of the federal courts when called upon to review a listing. We discuss these subjects in reverse order.

1. The Attorney General has defamed petitioners by designating them as organizations within Executive Orders 9835 and 10450, thereby injuring their reputations, property, and First Amendment freedoms. This blacklisting was done without a hearing. Petitioners were defaulted because they failed to answer interrogatories which were impossible to answer and which sought to invade their privacy, and because they protested the interrogatories and the Attorney General's assertion of a right to condemn them on secret accusations.

When petitioners applied to the federal courts, they were denied an opportunity to prove that the designations were baseless, because they had not complied with the Attorney General's unfair and impossible

conditions. The court below made this ruling without even considering whether the conditions were unreasonable or illegal, and in face of the fact that the petitioners had made protests, to which the Attorney General had not replied, against the conditions. Moreover, the court below took the peculiar view that an organization's assertion that it would, if necessary, "seek justice in the courts" was an "ultimatum" warranting denial of access to the courts.

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U. S. 123, held that an organization designated by the Attorney General is entitled to judicial review of the propriety of the designation. The court below has nullified this right by conditioning it upon compliance with impossible and illegal conditions of the Attorney General.

Certiorari should be granted in this case in the interests of the fastidious administration of justice, and to preserve for all organizations the right of judicial review established by the *Anti-Fascist* case.

2. Prior to the *Anti-Fascist* decision, the Attorney General claimed the right to designate organizations without notice or hearing. His present regulations purport to allow hearings for accused organizations. The fact is, however, that of the some 250 organizations currently designated by the Attorney General, including those which were first designated after the promulgation of the present regulations, not one received a hearing before designation, and there has been only one hearing after designation.[5] Also, on the

[5] This was a single hearing (in which the examiner's report has not yet been issued) for three allied organizations which had already been designated—the Independent Socialist League, its pre-

same day that petitioners were designated, 17 other organizations which had expressed a desire to contest proposed designations were designated without hearings for failure to reply "completely and with particularity" to interrogatories served on them by the Attorney General. 19 Fed. Reg. 655.

This case explains the absence of hearings. It shows that the Attorney General's regulations are devised and administered so as to deny the hearings which are promised on paper. It shows that a hearing is obtainable under the Attorney General's regulations only if the accused organization answers "completely and with particularity" interrogatories which are impossible so to answer because they are extravagantly vague and call for information which the organization does not have and cannot obtain. Those portions of the interrogatories which can be answered require the organization to submit to a burdensome and irrelevant inquisition which grossly invades the right of privacy.

The *Anti-Fascist* case did not decide whether due process requires an administrative hearing before organizations may be designated by the Attorney General. However, four members of the Court—Justices Black, Frankfurter, Douglas, and Jackson—expressed the opinion that a hearing was required by the Constitution.

In the present case, the Attorney General denied petitioners a hearing by the offensive device of conditioning a hearing on impossible terms. Moreover, if

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decessor, the Workers Party, and its youth group, the Socialist Youth League. It took the League at least six years of effort after its designation to obtain this hearing. See Chafee, *The Blessings of Liberty*, p. 28.

a hearing is constitutionally required, the Attorney General's regulations may not validly condition its availability on the making of responses to interrogation. Cf. *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 424-425. The conditions prescribed by the Attorney General's regulations are particularly objectionable because no limitations are placed on the scope and nature of the interrogatories which must be answered, and because, as this case illustrates, an objection to the interrogatories is treated as a default. Thus the Attorney General may, as he did here, condition the availability of a hearing on submission to a burdensome, irrelevant, and obnoxious inquisition.

This case demonstrates that the Attorney General is using the threat of defamation without hearing to coerce private organizations to investigate the affiliations of their members and other persons and to inform on them to the Department of Justice. Whatever may be the power of the federal government to investigate and screen its employees for loyalty and security reasons, it has no power under the Constitution to compel private organizations to become political investigators and informers for the Department of Justice. To defame petitioners for failing to answer the interrogatories was, therefore, an unconstitutional procedure.

If an organization manages to answer the Attorney General's interrogatories, it receives a hearing in which it has the burden of proof; the Attorney General's charges are evidence against it; the Attorney General may rely on the secret testimony of faceless informers; and the hearing examiner is not insulated from agency pressures. (See *supra,* p. 7.)

Certiorari should be granted in this case so that the Court may determine whether the petitioners were denied procedural due process, whether accused organizations are entitled to hearings, whether the Attorney General may condition the right to a hearing on an organization's submission to an unlimited inquisition, and whether the Attorney General's hearing regulations violate the Constitution and the Administrative Procedure Act.

3. The court below held (W. R. 51; L.R. 39) that the provisions of the Executive Orders authorizing the designation of organizations are constitutional. There can be no doubt that petitioners, having been designated, have standing to challenge the validity of the designation authority. This would be true even if petitioners had rejected an administrative remedy. So in *Cole* v. *Young*, 351 U. S. 536, this Court held that a petitioner's summary discharge was not authorized by law even though he had rejected a proffered administrative hearing. See *Cole* v. *Young*, 96 App. D. C. 379, 381, 226 F. 2d 337, 339. Similarly, a defaulted litigant may appeal the default judgment on the grounds that the court was without jurisdiction or the default was entered without observance of legal requirements. In the present case, moreover, so far from rejecting an administrative remedy, petitioners, as we have seen, were denied one by the impossible and illegal conditions of the Attorney General.

The question whether constitutional power exists to brand organizations by executive determination (leaving aside issues of procedural due process) is obviously a serious one. This Court accepted the question for review in the *Anti-Fascist* case, but did

not dispose of it. The asserted power is unprecedented in our jurisprudence. As Allan Barth has observed (*The Loyalty of Free Men* (Cardinal ed.) 110):

> "The mandate which the executive order gives the Attorney General to designate voluntary associations as subversive is perhaps the most arbitrary and far-reaching power ever exercised by a single public official in the history of the United States."

In the *Anti-Fascist* case, Mr. Justice Black expressed the opinion that the designation authority violated the First Amendment and was a bill of attainder. He stated (at 143) that the Attorney General's list "smacks of a most evil type of censorship." Mr. Justice Douglas was of the opinion that the standards for designation were unconstitutionally vague, and he stated (at 177) that their use would "plant within our body politic the virus of the totalitarian ideology which we oppose." In *Barsky* v. *Board of Regents,* 347 U. S. 442, 459, the dissenting opinion of Justices Black and Douglas described the list as "an attainder published by the Attorney General of the United States in violation of the Constitution."

The opinions in the *Anti-Fascist* case recognized that designation inflicts a serious and often deadly blow on the victimized organization (see at 139, 141, 142, 161, 175). A group so marked with governmental disfavor is inevitably deprived of members, supporters, audiences, and even meeting places.

The Attorney General's list is not an outright interdiction of organizations, but employs the method of the index expurgatorius and the blacklist. It is an executive edict that certain groups should be shunned

because they are heretical, disloyal, "subversive," or otherwise officially obnoxious. Any person who disregards this blacklisting incurs possible exclusion from governmental employment, public odium, and a host of other sanctions. Professor Chafee has remarked (*The Blessings of Liberty*, p. 27):

> ". . . . the list was compiled only to guide this federal program, and yet it has been widely employed by states and cities and even by private organizations as proof of the disloyalty of teachers and employees. The radio industry has accepted it as a basis for canceling the contracts of its performers. The list has accordingly become a powerful weapon for injuring any group there named or any individual who belongs to such a group."

As this Court commented in *Watkins* v. *United States*, 1 L. ed. 2d 1273, 1290:

> "That this impact is partly the result of nongovernmental activity by private persons cannot relieve the investigators of their responsibility for initiating the reaction."

As against the list's devastating effect on rights of speech, assembly and association, the only value claimed for it is that it is convenient in the process of excluding loyalty and security risks from governmental employment. Clearly, the claimed benefit does not counterbalance the impairment of constitutional rights. Moreover, the list is of minimum worth for its asserted purpose. For it is obvious that an individual's organizational affiliation is not a rational basis for determining his loyalty or reliability. What the individual does in an organization may be significant, but the affiliation itself is not. Cf. *Wieman* v.

Updegraff, 344 U. S. 183; *Adler* v. *Board of Education*, 342 U. S. 485.

The Attorney General himself has recognized that the list of organizations should have only a minor function in screening governmental employees. He ruled (emphasis supplied) that "membership in, affiliation with, or any sympathetic association with any organization designated is simply *one piece of evidence which may or may not be helpful* in arriving at a conclusion as to the action which is to be taken in a particular case." 5 C.F.R., App. A., p. 200, 13 Fed. Reg. 1471-3, referred to in the *Anti-Fascist* case at 206, ftn. 23. Furthermore, the government's employee loyalty and security program discredits employees for affiliations with non-designated organizations, as well as with designated ones,[6] a circumstance which makes the list irrelevant to the program.

The Attorney General's list of "subversive" organizations therefore has little or no utility for its ostensible purpose. Its real effect is to establish a blacklist of organizations which displease the government. This is invalid as a governmental coercion of

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[6] In the sample group of cases contained in Yarmolinsky, *Case Studies in Personnel Security* (Bureau of National Affairs, Aug., 1955) loyalty-security charges against government employees were predicated in part on affiliation with the following non-designated organizations, among others: Institute of Pacific Relations (p. 32), American Labor Party (p. 86), Progressive Party (p. 110), Book Find Club (p. 197), Descendants of American Revolution (p. 197), American Association of Scientific Workers (p. 198), United Public Workers CIO (p. 198), California Committee for Political Unity (p. 198), California People's Legislative Conference (p. 198), American Federation of Teachers (p. 198), Western Writers Congress (p. 198), Medical Bureau to Aid Spanish Democracy (p. 199).

orthodoxy. *West Virginia Bd. of Education* v. *Barnette*, 319 U. S. 624, 642.

Certiorari should be granted so that this Court may determine whether the Constitution permits the Attorney General to condemn organizations by designating them under the Executive Orders. Determination of this question is important to the preservation of constitutional liberties and should be deferred no longer. Mr. Justice Jackson stated in his posthumously published book (*The Supreme Court in the American System of Government*, p. 25):

> "Such delays often mean that the damage is done before the remedy for invasion of civil liberties is available. For example: In 1951 the Court cast serious doubts upon the legality of the Attorney General's list of subversive organizations promulgated in 1947. But the list had long been widely circulated and accepted, and despite the Court's views it has never ceased to be used in the press, in the executive department, by and before congressional committees, and even in courts to prejudice individuals in their liberty, position and good name."

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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